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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061796
Party	Defendant Kingston Technology Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Spancion LLC,)	
)	
Petitioner.)	Cancellation No. 92061796
vs.)	
)	
Kingston Technology Corporation,)	
)	
)	
Applicant.)	
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REPLY RE MOTION TO DISMISS AMENDED PETITION FOR CANCELLATION

Note: Similar motions are on file in copending matters Nos. 91222728 & 91218100.

In the matter of the above-identified Cancellation No. 92061796, Kingston Technology Corporation moves pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the Count set forth in Spancion LLC's Amended Petition for Partial Cancellation/Limitation of the registered mark HYPERX SKYN, Reg. No. 4,721,432. The Amended Petition does not state grounds upon which relief can be granted, fatally failing to allege sufficient facts to support standing and failing to allege descriptiveness sufficient to be plausible on its face.

Standing

Two points were raised by Kingston in the Motion to Dismiss this Amended Petition for Cancellation for lack of standing. The Amended Petition for Cancellation makes no allegation of Spancion's competition with or impact from the goods recited in the mark HYPERX SKYN and lacks any allegation of nexus between the Registration at issue and any damage to Spancion. Thus, Spancion has not pleaded facts to support a

real interest in this case sufficient for standing. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

1. Allegation of Line of Business

In the Response to this Motion to Dismiss, Spansion asserts that the full allegation of its line of business was truncated when referenced by Kingston. Possibly Kingston misunderstood the meaning of the term “including” in Spansion’s allegation. Spansion emphasizes that its “embedded system solutions” (included in the truncated recitation by Kingston) should be understood by the Board through judicial notice to be found in “goods that are competitive with and/or related and complementary to Kingston’s identified goods.” Response to the Motion to Dismiss, p. 8. Spansion is asking the Board to flesh out inadequate pleadings to establish standing.

The Response to the Motion to Dismiss (Section **A.1.**, p. 8) emphasizes Spansion’s line of business was alleged to include “embedded systems... [with] a wide variety of applications, including in connection with consumer electronics”. “Embedded” surely does not mean peripheral to. It does imply made integral with devices, also listed, which may be internal to consumer electronics. Thus, there is no assertion or implication that the Spansion business is consumer electronics themselves. The goods in the opposed Registration, i.e., mouse pads, are peripheral products which may or may not be associated with computers or gaming devices, but certainly are only associated with electronics at the consumer level. There are no facts pleaded in the Amended Petition for Cancellation supporting a natural expansion from embedded systems to peripherals for consumer electronics.

Spansion relies on use of the mouse pads recited in the Registration at issue in computer gaming in alleging descriptiveness (Amd. Pet. ¶¶ 9-15 and 21). However, Spansion does not allege that it has a presence in the gaming line of commerce or consumer electronics as may be employed in such gaming. Other than the allegation of its line of business discussed above, no allegation of Spansion's competition with or impact from the mouse pads recited in the opposed Registration is found in the Amended Petition for Cancellation. No real interest in the opposed Registration has been alleged.

Separately, the pleadings are deficient in a bare allegation of damage by Kingston attempting to develop a family of marks, Amd. Pet. ¶ 16:

Spansion is damaged by Kingston's attempts to develop a family of "HYPERX" marks in the electronics and computer industries, while simultaneously taking inconsistent positions as to the descriptiveness of the "HYPER" element in the marks at issue in pending Opposition No. 912818100 and the "HYPERX" element of the registration which is the subject of the instant proceeding.

In the Response to the Motion to Dismiss, p. 9, Spansion correctly states that the Amended Petition at ¶ 16 asserts damage from Kingston attempting to create a family of HYPERX marks. This assertion, however, is simply conclusory. Kingston asserts in the Motion to Dismiss the Petition, p. 8, that there is no allegation of how an alleged attempt to create a family of HYPERX marks damages Spansion and that there is no allegation of a nexus between damage to Spansion and activity attempting to build such a family. Spansion does not contradict these statements. Rather, Spansion declares that such supporting facts are unnecessary and that Kingston has cited no contra authority, Response to the Motion to Dismiss, p. 9. But the Supreme Court has defined

pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-9 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) as quoted in *Ashcroft*. The Court states at 556 U.S. 679:

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.

More substantive problems abound. Kingston has an incontestable registration for HYPERX, Reg. No. 2,848,874, for “Memory modules for computers and gaming systems” upon which any “family” would be anchored. The current opposed Registration has goods, mouse pads, not involving memory modules, thereby expanding any family away from Spansion’s alleged area of operation. Further, to assert damage, Spansion must have an infringed right with likelihood of confusion or with descriptiveness. Neither has been pleaded. See the failure to plead descriptiveness below. Any such intersection of rights would be resolved in favor of the existing incontestable HYPERX registration. Also, Spansion has made an admission against interest in the HYPERRAM Opposition, No. 91218100, in the Third Affirmative Defense which establishes that the prefix “hyper” is already the subject to numerous registrations and, thereby provides no available exclusive right in the prefix to Spansion:

The existence of numerous other registrations on the United States Patent and Trademark Register in Class 9 beginning with the prefix “hyper” and including a second element of generic, descriptive or disclaimed term, including marks for goods highly related to those of Opposer and/or Applicant....

The proceedings between these parties started with Kingston’s descriptiveness Opposition to HYPERRAM for memory devices. Spansion has responded with scorched earth tactics directing this Cancellation and an Opposition proceeding against

Kingston regarding a different mark, HYPERX, and various goods unrelated to Spansion's business or the random access memory devices (RAM) of the HYPERRAM mark. As to the mark involved in this opposed Registraton, Spansion has no standing and has pleaded none. The Kingston mouse pads in the opposed Registration are not pled to be related to Spansion's business; and the alleged damage from the creation of a family of marks is unsupported by any facts connecting the marks at issue thereto.

Distinctiveness

1. Spansion's Dilemma

Spansion is on the horns of a dilemma. If Spansion pleads the component "hyper" of the mark HYPERX to be descriptive and laudatory in the Amended Petition for Cancellation, it will have pleaded sufficiently. But by doing so, Spansion will have made admissions against interest. *See Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1725 n.7 (TTAB 2010) (assertions in answer not evidence...except as admission against interest); TBMP §704.06(a). These admissions against interest will doom Spansion's application for the mark HYPERRAM in the concurrent Opposition, No. 91218100.

The element of the mark at issue in the opposed Registration, HYPERX, is fanciful or suggestive in its entirety. To assert descriptiveness, Spansion has broken the mark in two, "hyper" and "x" (Amd. Opp. ¶¶ 5-10 and 18-20). Spansion makes allegations as to the descriptiveness of the component "x" of the mark HYPERX (Amd. Pet. ¶¶ 9, 10 and 20), but does not complete the analysis by making allegations as to the descriptive and laudatory nature of the component "hyper". Instead, Spansion

expressly alleges that “hyper” of the mark HYPERX is not descriptive (Amd. Pet. ¶ 22), leaving Spansion with insufficient allegations of descriptiveness.

The mark in the Opposition referenced in ¶ 22, HYPERRAM, includes “RAM”, a universal generic term for the goods claimed in the Spansion Application there at issue. To this generic term, the prefix “hyper” is asserted by Kingston to be a merely descriptive and laudatory addition. An allegation by Spansion that “hyper” is a merely descriptive and laudatory addition, given the asserted meaning of the term, would be inconsistent with Spansion’s Answer in that Opposition and damning of the mark HYPERRAM.

Spansion has devised two strategies in its Amended Opposition to avoid making the allegation that “hyper” is merely descriptive and laudatory, given the dilemma it faces. First, Spansion irrelevantly repeats the allegations made by Kingston in the HYPERRAM Opposition, not as its own, but with attribution to Kingston. Second, Spansion contingently pleads the prospect of an adverse finding against Spansion in the HYPERRAM Opposition (Amd. Pet. ¶22).

2. Spansion’s First Strategy

Turning to the first strategy, Spansion alleges that “hyper” in HYPERX is not descriptive (Amd. Pet. ¶ 22). Spansion insists in the Response to the Motion to Dismiss (Section **B.2.**) that Spansion can plead inconsistently. Even so, Spansion has not done so. Spansion points in the Response to the Motion to Dismiss (Section **B.1.**) to the Amended Petition ¶¶ 5 and 8, which repeat or refer to the allegations Kingston made in the HYPERRAM Opposition against that different mark. Each is made, not as an

allegation of Spansion to support the Amended Petition, but as an allegation of Kingston, p. 11:

Using Kingston's own allegations, Spansion first notes how the term "HYPER" could be perceived as being descriptive of the identified. See Spansion's Amended Notice, at ¶¶ 5 and 8.

Kingston agrees with this characterization by Spansion that it is using Kingston's own allegations. Further, Spansion cannot point to any specific such allegation of its own as there are none to be found. The same attribution to Kingston is made in Amd. Pet. ¶ 18, stating "Kingston claims" and "Kingston alleges".

Kingston here predicts that Spansion will shockingly reverse position following the pleading phase and assert that they never alleged that "hyper" is merely descriptive and laudatory. Spansion has tried to come as close to the line as they dare. If the Board holds that Spansion's incorporation of Kingston's position is in fact an allegation of Spansion, Kingston believes that Spansion would then be stuck with the obvious reality of that allegation as the proceedings advance. Alternatively, they have asked for another opportunity to try again to approach the line the Response to the Motion to Dismiss (Section C.).

3. Spansion's Second Strategy

Turning to the second strategy to avoid asserting that "hyper" is merely descriptive and laudatory, Spansion, contingently pleads the prospect of an adverse finding against the Spansion mark HYPERRAM, Amd. Pet. ¶ 22:

As set forth in its Answer in Opposition No. 91218100, Spansion denies that the prefix "HYPER" is a merely descriptive term as applied to electronic and computer goods or that its mark HYPERRAM is descriptive. However, to the extent that the Trademark Trial and Appeal Board finds otherwise....

Kingston has asserted in the Motion to Dismiss the Amended Petition (pp. 10-11) that the prospective adverse finding against Spansion's HYPERRAM has no prospect of legal relevance to the Amended Notice of Opposition, TMEP 1209.01(b) with citations:

The great variation in facts from case to case prevents the formulation of specific rules for specific fact situations. Each case must be decided on its own merits. See *In re Ampco Foods, Inc.*, 227 USPQ 331 (TTAB 1985); *In re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977).

HYPERRAM is not the same mark as HYPERX. Points of difference are presented, Motion to Dismiss the Amended Notice of Opposition, pages 10-11.

Spansion enunciates a standard that pleadings are to be accepted on their face for purposes of pleading sufficiency, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) as quoted in *Ashcroft*, Response to the Motion to Dismiss (p. 5). Spansion later attempts to discredit the irrelevance of the prospective ruling against HYPERRAM as an "improper attempt to argue the merits", Response to the Motion to Dismiss (Section **B.3.**). However, no mention of *Ashcroft* or *Twombly* is made in Section **B.3.** Ironically, these two landmark cases embody a move by the Supreme Court in *Ashcroft* to refine the standard for pleadings, not to require proof, but to reject the tenet that a legal conclusion couched as a factual allegation or an implausible claim must be accepted as true, *Ashcroft v. Iqbal*, 556 U.S. 555-556:

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and

generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F. 3d, at 157–158.

Implicit in the contingent reliance on the prospective adverse finding against Spansion is its relevance to the Amended Counterclaims. Under *Ashcroft v. Iqbal*, the legal impossibility of any such ruling being relevant to the Amended Counterclaims is a legitimate substantive inquiry to measure the sufficiency of the pleadings. Spansion's pleading (Amd. Pet. ¶ 22) are conclusory and without support to overcome the irrelevance of this contingency.

Conclusion

The Amended Petition for Cancellation of Spansion lacks standing and does not effectively allege descriptiveness of the opposed Registration of Kingston. Spansion has not established a "real interest in the proceeding." Spansion has characterized its business as "computer memory products and embedded systems solutions", including their use in consumer electronics. The Opposed Marks of Kingston, having nothing to do with such commerce, are mouse pads. No competition or relationship between the goods and Spansion's business has been alleged, including that of electronic gaming. Spansion's only allegation of damage is that Kingston is attempting to create a family of marks. But Spansion does not connect any such attempt with damage to Spansion. No damage has been identified. Without standing, the Amended Petition for Cancellation fails.

Regarding descriptiveness, Spansion is caught on the horns of a dilemma. Its efforts to avoid same in the Amended Petition for Cancellation have become obvious. Spansion fails to allege, and thereby has not admitted unless found to have done so by the Board, the well accepted meanings of “hyper”. Spansion also attempts to plead a contingency to overcome its failure to allege the meaning of “hyper” as part of its two-part analysis of “hyper” and “x”. The contingency is based on a prospective order of the Board which is legally irrelevant as it pertains to a mark and the goods therefor not at issue in the Amended Petition for Cancellation. The issue raised by this legal irrelevance is appropriately before the Board at the pleading stage under *Ashcroft v. Iqbal*, 556 U.S. 662.

Dismissal of the Amended Notice of Opposition with prejudice is requested.

Respectfully submitted,
KINGSTON TECHNOLOGY CORPORATION

Date: September 25, 2015	By <u>/John D McConaghy/ [electronic signature]</u> John D. McConaghy Breton A. Bocchieri Christine Yang Attorneys for Applicant
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper is being served upon all parties to this proceeding at the address recorded in the following manner on the date this filing is submitted, September 25, 2015.

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